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 THE REGENTS OF THE UNIVERSITY OF
 CALIFORNIA, TODD MCGREGOR and JAMES
 JACOBS (EXEMPT FROM FEES, GOV. CODE § 6103)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NETTA GRUTMAN,

Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF
 CALIFORNIA, et al.,

Defendants.

) CASE NO. 10-02347 JCS

) **DEFENDANTS' MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**

) Date: TBD

) Time: TBD

) Location: TBD

) Complaint filed: April 16, 2010

) Trial Date: March 5, 2012

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1 TO PLAINTIFF NETTA GRUTMAN AND TO HER ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT, at a time and place to be determined by the above-
3 entitled Court, defendants, The Regents of The University Of California (at times, the "UC"),
4 Todd McGregor and James Jacobs will, and hereby do, move for partial summary judgment on
5 plaintiff's fourth claim for relief for violation of the California Unruh Civil Rights Act,
6 California Civil Code section 51 *et seq.*, to the extent that plaintiff seeks recovery of more than a
7 single statutory minimum damage assessment.

8 This Motion is brought, pursuant to Federal Rule of Civil Procedure 56, as well as a
9 Stipulation and Order (Docket # 38), on the ground that the availability of more than one
10 statutory minimum damage assessment in this instance is, as a matter of law, unavailable, and
11 that defendants are entitled to partial summary judgment on such basis. This Motion will be
12 based on this Notice, the Memorandum of Points and Authorities embodied herein, the
13 accompanying declarations of James Jacobs, Jerome Schreiberstein and Sergio Ornelas, the
14 Request for Judicial Notice, and the Appendix of Cases Without Official Citations, together with
15 the complete files and records in this action, and such further argument and competent evidence
16 as may hereinafter be timely presented.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. INTRODUCTION**

19 This is principally an Americans with Disabilities Act (ADA) equal access case brought
20 by plaintiff Netta Grutman (at times, "plaintiff") against the UC, and two of its student housing
21 officials, James (Jim) Jacobs and Todd McGregor. Plaintiff, a former resident of the student
22 Housing Complex at the UC's Mission Bay campus (at times, the "Housing Complex"), asserts
23 she had some challenges, for a brief period of time during her residency, opening the glass front
24 doors of the residential tower, which housed her apartment unit. Notwithstanding that the
25 Housing Complex was designed and constructed to applicable building Codes, which included
26 the ADA's disability equal access guidelines, and that plaintiff never supplied to the UC any
27 evidence that she had a qualifying disability, the UC remediated, to plaintiff's satisfaction, the
28 issue with the front doors of the building via installation of a remote push-button access

1 mechanism only seven weeks after plaintiff initially raised the issue. It is undisputed that
 2 plaintiff never raised any other equal access issues with defendants during her residency.

3 This Motion seeks to limit any potential recovery for plaintiff under the Unruh Civil
 4 Rights Act (the "UCRA") to a single assessment of the minimum statutory assessment (\$4,000).
 5 Plaintiff seeks to recover such minimum assessment for each and every occasion where she
 6 claims that her access to the Housing Complex was made more difficult by the front door's
 7 resistance. In other words, plaintiff seeks to recover \$4,000 for each of the *hundreds* of times
 8 she went through the door over the seven-week period in question.

9 The UCRA should not be read to allow for such recovery. First, plaintiff's predicate
 10 claim of an ADA violation is essentially the allegation of a continuing violation and failure to
 11 accommodate and would simply constitute a single offense for UCRA purposes. Second, the
 12 UCRA legislation itself has been carefully crafted and recently amended in an effort to preclude
 13 the exact type of opportunistic reading as urged by plaintiff. This Court should exercise the
 14 appropriate restraint, follow analogous authorities and hold, as a matter of law, that plaintiff may
 15 only recover a single statutory assessment should she prevail on her asserted UCRA claim.
 16 Defendants' within Motion should be granted to settle this issue and excise this unsustainable
 17 damage claim from this action.

18 **II. SUMMARY OF ARGUMENT**

19 The UCRA is an important piece of civil rights legislation providing for injunctive and
 20 monetary relief where its provisions have been violated. Plaintiff's claims under the UCRA
 21 essentially rest on predicate theories of (1) intentional ADA discrimination/failure to
 22 accommodate, and (2) violation of construction-related access standards. She seeks actual
 23 damages for the claimed UCRA violations, and also the recovery of a \$4,000 minimum
 24 assessment for each occasion – i.e., *use* – of the facilities where she claims she encountered a
 25 standards violation.

26 Such recovery must be foreclosed under both of plaintiff's theories. Her ADA claim
 27 essentially comprises a continuing violation on the UC's part in its alleged failure to timely
 28 remediate the asserted discriminatory practice. It can only be seen as a single offense under the

UCRA. Similarly, where plaintiff's residency at the Housing Complex was continuous, she should not be permitted by this Court to claim a statutory minimum assessment for each occasion where she claims to have encountered a standard violation. The legislative history of the UCRA and analogous decisional authorities make clear that such a windfall was never intended. Indeed, to permit such a theory of recovery would pervert the important public policy goals of advancing the interests of those with disabilities and seeking prompt and durable resolution in favor of individual and frivolous claims – like the within – asserting exponential recovery for each time access can be proven while the UC worked rapidly to resolve the issue. Delay and abuse would be incentivized, rather than notice and redress.

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Plaintiff Netta Grutman

Plaintiff is a 26-year-old Hastings Law School graduate, who took and passed the July 2010 Bar Examination, and awaits the moral character findings relative to her application for admission to practice law in the State of California. (See Deposition Transcript of Netta Grutman (“Grutman TR”) at 12:3-13:8, 92:2-3, 16:7-8, 142:21-143:14; pertinent portions of and Exhibits to the Grutman TR are attached, respectively, as Exhibits A and B to the accompanying Declaration of Jerome Schreiberstein.)¹

B. Plaintiff's Law School Studies and Dubious Law School Transfer Application

Plaintiff began her law school studies in January 2007 at Thomas Jefferson School of Law in San Diego. She had not been accepted at a school of her choosing, including any of the law schools associated with the University of California to which she had applied. (Grutman TR at 22:10-23:22.) Plaintiff did well at Thomas Jefferson and, following three semesters at that school, determined to seek transfer to a number of UC schools, including Hastings College of the Law. (*Id.* at 25:2-26:1, 84:8-23, Ex. 9 (Law School Transcript).) In her transfer application to Hastings, plaintiff wrote movingly of her years-long, but ultimately successful battle with Lyme Disease, the impact it had on her undergraduate grades, and hoped that Hastings would

¹ Plaintiff requested additional time to complete the Bar Exam. on account of her ostensible disabling condition and the request was rejected. (Grutman TR at 20:18-21:15.)

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1 “recognize [her] academic recovery as evidence of [her] passion for and commitment to law
2 school and the legal profession.” Plaintiff averred that she would “exhibit the same strengths in
3 succeeding at University of California, Hastings College of the Law as [she] did in overcoming
4 [her] illness.” (*Id.* at 26:18-28:3, Ex. 1)

5 Despite this, plaintiff’s deposition testimony was that she had no recollection of any
6 significant medical history before law school. (*Id.* at 23:23-24:3.) More particularly, she denied
7 (or could not remember) any medical treatment or medication (other than for acne) during her
8 undergraduate years and denied a recollection of experiencing the symptoms which she
9 described in her transfer application. (*Id.* at 30:4-32:1, 38:23-39:19, Ex. 4.) When confronted
10 with the application essay at deposition, plaintiff became flustered and could not meaningfully
11 account for the statements in question. (*Id.* at 28:4-32:4.) She testified she did not know if the
12 statements regarding Lyme Disease were true and she could not state whether any health care
13 practitioner had ever told her that she had the condition. (*Id.* at 28:17-29:13, 17:14-16, 30:20-
14 22.) When pressed as to how it was she could prepare and submit this essay without knowing if
15 its contents were true, she simply stated that she wished to “tell a compelling story” to get into
16 Hastings. (*Id.* at 28:17-29:9.)

17 Plaintiff was accepted at Hastings and given a \$5,000.00 scholarship. (*Id.* at 32:13-33:9,
18 Exs. 2-3.) She moved into the Hastings residential tower and did not request or receive any type
19 of housing accommodation there. (*Id.* at 18:4-8; 33:15-18, 70:6-24.)

20 **C. The Onset of Plaintiff’s Vague, Subjective Pain Disorder During Her First Year**
21 **(2008) at Hastings**

22 Shortly after beginning her Hastings’ studies in August 2008, plaintiff claims that she
23 started to suffer some muscle and nerve pain in her left arm and shoulder. (Grutman TR at
24 17:17-18:12, 35:19-23.) She denies any specific trauma or injury. (*Id.* at 18:13-15.) In early
25 September 2008, Dr. Stephen Van Pelt diagnosed a cervical sprain and predicted that plaintiff’s
26 symptoms would resolve by November 1, 2008. (*Id.* at 43:23-47:15, 52:5-14, Ex. 6.) Plaintiff
27 later had MRIs of her neck and shoulder, but could not recall the results. (*Id.* at 56:2-9.) Her
28 symptoms were essentially the same by January 2009. (*Id.* at 56:17-21.) She tested negative for

1 Lyme Disease. (*Id.* at 62:24-63:2.) She did not recall ever hearing a specific diagnosis for her
 2 condition based on the results of any diagnostic testing, or otherwise. (*Id.* at 66:4-21, 67:6-19,
 3 75:15-23.) Plaintiff took some prescribed pain medications without significant improvement.
 4 (*Id.* at 52:15-53:10.) She also underwent several rounds of physical therapy. (*Id.* at 48:3-49:2.)

5 Because of her symptoms, plaintiff asked for and was given extra time to complete her
 6 law school exams. (*Id.* at 73:11-21.) On this same basis, Hastings also approved plaintiff's
 7 request, in contravention of its standard policy, to transfer some summer law school credits from
 8 USF for classes she planned on attending the summer before moving to the Housing Complex.
 9 (*Id.* at 80:17-81:17, Ex. 8.)

10 **D. Plaintiff Applies for Residency at Mission Bay, Denies any Disability, Moves in to**
 11 **the Housing Complex in August 2009 and Stays until her May 2010 Graduation**

12 Plaintiff applied online for her Mission Bay apartment and claims she never set foot at
 13 the campus before picking up the keys for her unit. (*Id.* at 83:14-17, 93:20-24.) She never asked
 14 for and never took a tour of the facility. (*Id.* at 83:11-13.) In completing her online application,
 15 plaintiff denied the existence of a disability. (*Id.* at 91:16-92:23, Ex. 10.) Plaintiff also
 16 completed and executed a Student Housing Agreement, which specified, at Section 44, a
 17 procedure by which a tenant could signify his/her need for a housing accommodation, which in
 18 the case of Hastings students, such as plaintiff, required a letter of verification from the Hastings
 19 Disability Resource Program respecting the disabling condition. Plaintiff had no recollection of
 20 ever providing any such verification of a disabling condition to the UC and the UC has no
 21 evidence of receiving such verification. (*Id.* at 100:20-103:20, Ex. 12; accompanying
 22 Declaration of James Jacobs ("Jacobs DEC"), ¶ 7.) Plaintiff began her occupancy in the South
 23 Residential Tower on August 17, 2009 and resided there continually until May 2010, at which
 24 point she vacated due to her law school graduation. (*See* Grutman TR at 95:21-96:22, 103:21-
 25 105:15, Exs. 11, 13, 14.)

26 **E. The Housing Complex**

27 The UCSF Mission Bay Housing Complex is located in San Francisco and is comprised
 28 of four (4) buildings, referred to as the South, East, North, and West Buildings. The buildings

1 are arranged in a rectangle and share a common courtyard area. Plaintiff resided in the South
2 Building. There are 431 units between the four residential buildings. The majority of residents
3 are students and postdoctoral scholars at UCSF; however, a few other students attending other
4 schools (*e.g.*, Hastings) also reside there. (*See* Jacobs DEC, ¶ 3, Ex. A.)

5 The construction project was built to comply with the California Building Standards and
6 codes (including the 1998 amendments) and the Uniform Building Code, among others standards
7 and codes. It is UC's understanding that the California Building Standards and other applicable
8 codes incorporate all applicable handicap/disability access requirements, including ADAAG
9 Guidelines, applicable ANSI A117.1 standards, and the federal Fair Housing Act. The plans
10 were approved by the State Board of Architecture prior to a Certificate of Occupancy being
11 issued for the use of the Complex facilities. (*Id.*, ¶ 4.)

12 On the ground floor, the front lobby of each of the residential building is equipped with a
13 set of two glass entry doors. The Housing Complex is subject to strong winds. The pressure on
14 the lobby doors is, accordingly, set to resist the strong wind and ensure that entry doors close
15 securely in such winds. This resistance is often perceived as, and described as, a door's
16 "weight." (*Id.*, ¶ 5.)

17 Due to the effect of the strong winds upon the entry doors, they occasionally require
18 adjustment. The lag time during which the lobby doors close behind tenants as they enter the
19 buildings is known to create a security risk to tenants in the residential buildings. The slower the
20 doors close, the more opportunity is created for unauthorized individuals to follow behind
21 tenants and gain entry to the buildings (this is referred to as "tailgating"). Such a tailgating
22 incident occurred in February 2007 in the East Building. As a tenant entered the building, a
23 burglar followed behind the tenant, grabbed hold of one of the lobby doors as it was closing, and
24 gained entry into the building. Once inside, the burglar removed one of the building's fire
25 extinguishers, used it to break through a wall adjacent to a residential unit, then reached through
26 the opening, unlocked the unit door from the inside, and entered the (fortunately) unoccupied
27 residence and stole a laptop computer and money. (*Id.*, ¶ 6.)
28

F. The UC's Prompt Response to Plaintiff's Requests for Modifications to the Housing Complex

Plaintiff began her occupancy in the Housing Complex on August 17, 2009 in the South Building. As noted, at the time she took up occupancy, plaintiff did not inform Campus Housing officials that she might require an accommodation for a disability. Had she done so, she would have originally been assigned a unit in the West Building, which has "lighter" entrance doors. (See Jacobs DEC, ¶ 7.)

On September 3, 2009, plaintiff sent an email to Todd McGregor, the Housing Services Manager at the Complex, advising that she had a left shoulder and arm nerve injury. Due to the injury, she used a roller book bag and claimed she was experiencing difficulty when using the front door to enter and exit the South Building.² Specifically, she found the door to be of "immense weight," "very heavy to open," and to "slam shut immediately upon letting go" She described her efforts to use the door while pulling the roller bag. She claimed that using the door exacerbated her condition. On September 8, 2009, Mr. McGregor emailed Ms. Grutman that he was submitting a maintenance work-order on her behalf relative to the door. (Grutman TR at 112:8-113:18, Ex. 15.)

On September 21, 2009, plaintiff again emailed Mr. McGregor and informed him that there had been a maintenance sign on the door, but it had been taken down. Plaintiff felt "the door is now heavier than it was before." She asked that the situation be addressed and asked Mr. McGregor to "personally come and open the door." (*Id.*, Ex. 15.)

On September 22, 2009, Mr. McGregor emailed Ms. Grutman that the lobby door had been fixed. He informed that the door "is intentionally slightly heavy so that it will close securely in the high winds common in the afternoons at Mission Bay." Mr. McGregor had personally checked the front doors and found them to be functioning as intended. That same day, plaintiff responded to Mr. McGregor by email that "The door is not slightly heavy. It is insanely heavy. It is heavier than it was before." She claimed that "my left arm is the one which

² Plaintiff could not recall ever documenting a complaint to anyone at the UC as to any other equal access challenges at the Housing Complex. (Grutman TR at 109:17-25.)

1 [sic] nerve problems and the door is even too heavy to hold with my right arm.” (*Id.*)

2 On September 24, 2009, plaintiff emailed Jim Jacobs, (then interim) Director of Housing
3 Services at Mission Bay, to whom Mr. McGregor reports. Ms. Grutman requested that the door
4 be adjusted to be less heavy. On October 2, 2009, Mr. Jacobs responded to Ms. Grutman,
5 inviting her to make an appointment to meet with him in person to discuss the problems which
6 she advised she was having with the door. Mr. Jacobs had spoken with his staff and had
7 information to share with her. (*Id.* at 113:19-116:13, Ex. 16.)

8 On October 5, 2009, plaintiff responded by email to Mr. Jacobs, inquiring whether he
9 could share the information by phone since she claimed she was not at the Mission Bay Housing
10 Complex during business hours. On October 6, 2009, Mr. Jacobs responded by email to Ms.
11 Grutman. He wrote that since plaintiff was ostensibly unable to meet in person he was emailing
12 her to discuss possible solutions to the problems she was experiencing with the doors and that the
13 two of them (Ms. Grutman and Mr. Jacobs) could follow-up with a phone call as helpful. He
14 wished to mitigate the problems she was having. Mr. Jacobs had spoken to the maintenance
15 staff, who informed him that they had adjusted the doors and done everything possible to
16 improve their functionality, without jeopardizing the security of the tenants in the building. Mr.
17 Jacobs explained the security risk, and described the incident that had occurred two years earlier
18 when someone “tailgated” into the East Building and burglarized one of the residential units.
19 (*Id.*, Ex. 16.)

20 Mr. Jacobs suggested the solution of using an alternative entrance. The maintenance staff
21 had adjusted a courtyard gate so that it was much easier to open. Mr. Jacobs suggested another
22 possible solution: that Ms. Grutman move into a unit in the West Building. The entry door to
23 this building was easier to open. Mr. Jacobs offered that the UC would pay the cost of Ms.
24 Grutman’s moving into the West Building. (*Id.*, Ex. 16.)

25 On October 7, 2009, plaintiff responded to Mr. Jacobs’ email. She did not consider
26 viable either of the solutions he had suggested. She had experienced difficulty with the
27 courtyard gate. She felt that moving to the West Building would be “a huge life interruption.”
28 She also felt that the doors to the West Building were not any more accessible than the doors to

1 the South Building. (*Id.*, Ex. 16.)

2 On October 9, 2009, Mr. Jacobs emailed Ms. Grutman that he was sorry to hear that the
3 options he suggested would not work for her. He advised her that he was to meet with the
4 Facilities Operation Manager on Tuesday (October 13, 2009) to see what next steps would be to
5 resolve the problem. In his October 9, 2009 email, Mr. Jacobs also requested that plaintiff
6 provide him with documentation of her disability. Plaintiff did not respond to this request and
7 never provided the UC any verification of her claimed disabling condition, though the UC
8 proceeded in good faith despite this lack of verification. (*Id.* at 116:14-118:2, Ex. 16; Jacobs
9 DEC, ¶ 7.)

10 On October 15, 2009, Jim Jacobs, Nick Plezbert (of the UC Office of Affirmative Action,
11 Equal Opportunity and Diversity), whom plaintiff had also contacted, met with Ed Ilumin,
12 Compliance Officer in the Fair Housing/Public Accommodations Department of the San
13 Francisco Human Rights Commission, with which plaintiff had filed a complaint (since closed),
14 to inspect the doors of the Housing Complex. Mr. Jacobs advised Mr. Ilumin that the UC had
15 decided to install an automatic door opener on the entrance doors to the South Building in order
16 to accommodate Ms. Grutman's request. He planned to make immediate arrangements for this
17 installation. He estimated that the installation could be completed within one (1) to three (3)
18 weeks, depending on the availability of the contractor. (*See* Jacobs DEC, ¶ 8.)

19 UC advised plaintiff of the agreed upon work and its expected timing. (*See* Grutman TR
20 at 128:17-129:18, Exs. 20, 21.) On October 22, 2009, one week after the meeting with the City
21 and approximately seven weeks after the initial complaint, the work on the South Building door
22 was completed, and plaintiff was notified of such. (*Id.* at 130:22-131:8, Ex. 23.) On November
23 2, 2009, Mr. Ilumin wrote to Mr. Jacobs advising, among other things, that he had been
24 contacted by Ms. Grutman, who had stated to Mr. Ilumin that she was "very satisfied with added
25 disability access mechanisms installed." (*Id.* at 131:9-132:16, Ex. 24.) Following the
26 modification work on the South Building front door, the UC heard no further complaints from
27 plaintiff concerning any access issues associated with the Housing Complex. (*Id.* at 132:17-
28 135:4, Jacobs DEC, ¶ 9.)

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Plaintiff could not say that she used the front door on average less than 10 times per day during this period, but could say that she used the front door on average less than 20 times per day. (Grutman TR at 110:1-112:4.) The UC records show that plaintiff accessed this door, often multiple times per day, virtually every day from the inception of her tenancy until the 2009 winter break; there being no greater usage after the remediation. (*See* Declaration of Sergio Ornelas at ¶ 2, Ex. A.)

G. Plaintiff Has No Substantiated Damages Relative to Her Claims of Denied Access

No physician has advised plaintiff that her condition had worsened due to access issues at the Housing Complex, although plaintiff alleges that is the case. (*See* Grutman TR at 138:7-15.) From plaintiff's own perspective, there was a specific burning that she felt in her left and arm shoulder after moving to the Housing Complex that she had not felt previously. She had not seen a doctor or received treatment for that symptom, but the care provided included plaintiff's discussion of this symptom. She still experiences this pain on occasion, but not often. Additionally, plaintiff testified to having increased sleeping difficulties following her Mission Bay residency, but she was unable to quantify this in any way. Plaintiff testified to general upset relative to the issues, but could not identify any other particular symptoms, and denied any treatment at any point with any mental health provider. (*Id.* at 138:16-142:10.)

Plaintiff has never come out of pocket for any medical treatment associated with her arm and shoulder issues. She had student-provided insurance while at Hastings, and has had her own insurance since graduating. (*Id.* at 142:11-14.)

Plaintiff could not identify any wage loss accruing as a result of her equal access challenges at Mission Bay. Nor could plaintiff identify any damage to her earning capacity. She is currently working full-time as a Law Clerk for a law firm in Los Angeles. (*Id.* at 143:24-144:11.)

IV. ARGUMENT

A. Under ADA Intentional Discrimination Theory, Plaintiff Can Recover, at Most, for Single Alleged Offense of Denied Accommodation under UCRA

California Civil Code section 52(a) provides that whoever engages in actionable

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discrimination under Civil Code section 51³ is liable “for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times⁴ the amount of actual damages but in no case less than four thousand dollars” Civil Code section 51(f) provides that the “violation of the right of any individual under the ADA” shall constitute a UCRA violation. There is – in effect - but one intentional ADA violation alleged in this action and, accordingly, only a single statutory damage assessment may issue.

More particularly, plaintiff’s case is premised, in part, on allegations of intentional discrimination and denied reasonable accommodation by defendants. While plaintiff references Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12181 *et seq.*, in her Complaint allegations, claiming she was denied “equal access to defendants’ goods, services, facilities, privileges, advantages, or accommodations within a public accommodation owned, leased, and/or operated by defendants...” (see Complaint, ¶ 29), “[T]itle III of the ADA applies to private entities providing public accommodations,... not to public entities ... Entities subject to Title III include private schools, but not public ones.” (*Debord v. Board of Educ.*, 126 F.3d 1102, 1106 (8th Cir. 1997) (internal citations omitted) (emphasis supplied); *see, also, Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 875-876 (9th Cir. 2004); *Sandison v. Michigan High Sch. Athletic Ass’n, Inc.*, 64 F.3d 1026, 1036 (6th Cir. 1995); *Harris v. Oregon Health Sciences Univ.*, 1999 U.S.Dist. LEXIS 16231, * 6-8 (D. Or. 1999).)

Thus, insofar as her discrimination claims are concerned, plaintiff is left only with her claim for intentional disability discrimination under 42 USC section 12132 (Title II of the ADA), and her similar claim under the Rehabilitation Act of 1973. (*See Ferguson v. City of Phoenix*,

³ Though not the subject of this Motion, it is debatable whether plaintiff may, as a matter of law, pursue any UCRA claim. The UCRA provides for relief only upon an actionable violation in a “business establishment.” (Cal. Civ. Code § 51(b).) Thus, operations of a public entity are generally not considered those of a business establishment. (*See Qualified Patients Assn. v. City of Anaheim*, 187 Cal.App.4th 734, 764-765 (Cal.App. 2010) (UCRA does not apply to City’s enactment of legislation); *Burnett v. San Francisco Police Department*, 36 Cal.App.4th 1177, 1191-92 (Cal.App. 1995) (same); *Wilkins-Jones v. County of Alameda*, 2010 U.S.Dist. LEXIS 121218, * 32-40 (N.D. Cal. 2010) (prison was not a “business establishment”).)

⁴ Defendants, as a public entity, and public officials, are not subject to treble damages. (*M.J. v. Clovis Unified Sch. Dist.*, 2007 U.S.Dist. LEXIS 28761, * 36-37 (E.D. Cal. 2007).)

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1 157 F.3d 668, 674 (9th Cir. 1998) (Title II ADA violation required proof of intentional
2 discrimination); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001) (same for
3 Rehabilitation Act).) Accordingly, to the extent predicated on allegations of intentional
4 discrimination and denied accommodation, plaintiff must prove up her predicate intentional
5 discrimination claim to recover under the UCRA. (See *C.B. v. Sonora Sch. Dist.*, 691 F.Supp.2d
6 1123, 1154-1155 (E.D. Cal. 2009).)

7 An ADA violation is established where a plaintiff proves that: “(1) [s]he is a ‘qualified
8 individual with a disability’⁵; (2) [s]he was either excluded from participation in or denied the
9 benefits of a public entity’s services, programs, or activities, or was otherwise discriminated
10 against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by
11 reason of h[er] disability.” (*Duvall v. County of Kitsap*, 260 F.3d at 1135 (citing *Weinreich v.*
12 *Los Angeles County Metropolitan Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997).) “To
13 succeed on these latter two elements, plaintiff bears the burden of proving that she came into
14 actual contact with specific barriers, whether programmatic or architectural, and that by reason
15 of her disability, she was unable to meaningfully access the ... programs, services, and benefits
16 as a result of those specific barriers.” (*Wilkins-Jones v. County of Alameda*, 2010 U.S. Dist.
17 LEXIS 121218, * 36 (N.D. Cal. 2010).)

18 As detailed above, plaintiff sought adjustment to the front lobby door to the Housing
19 Complex, though she continued to reside at and to utilize the facility many times each day. She
20 never moved from the Housing Complex and even rebuffed an offer that the UC made to pay to
21 move her to another unit within the Complex. The allegation is essentially one of a continuing
22 violation under the ADA. Under the continuing violation doctrine in this Circuit, if a
23 discriminatory act takes place within the limitations period and that act is “related and similar to”
24 acts that took place outside the limitations period, all the related acts - including the earlier acts -
25 are actionable as part of a single, continuing violation. (*Fielder v. UAL Corp.*, 218 F.3d 973,
26 987-88 (9th Cir. 2000); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108-11 (9th Cir.
27 1998).) Thus, it has been held that a continuing failure to accommodate constitutes a continuing

28 ⁵ Defendants dispute that that plaintiff is a qualified individual with a disability.

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1 ADA violation. (*See Californians for Disability Rights, Inc. v. Cal. DOT*, 2009 U.S. Dist. LEXIS
2 91490, * 13-15 (N.D. Cal. 2009) (allegations regarding non-ADA-compliant Cal-Trans facilities
3 constituted continuing violations); *O'Loughlin v. County of Orange*, 229 F.3d 871, 876 (9th Cir.
4 2000).)

5 Ours, then, is a distinct factual situation from cases where multiple visits spread out over
6 weeks, months or years have been held to give rise to separate, compensable UCRA violations
7 because, here, plaintiff's access to the subject facility never ceased following inception. That is,
8 she moved in and outstayed the ostensible violation. (*Cf. Feezor v. Del Taco, Inc.*, 431
9 F.Supp.2d 1088, 1090-1091 (S.D.Cal. 2005) (court allowed \$4,000 in damages for each
10 obstructed visit of November 2, 2003, September 10, 2004, and January 10, 2005 to defendant's
11 restaurant establishment); *Hubbard v. Rite Aid Corp.*, 433 F.Supp.2d 1150, 1170 (S.D.Cal. 2006)
12 (husband and wife each entitled to \$4,000 per each of three obstructed visits on November 17,
13 2002, July 29, 2003 and January 24, 2004) (for a total of \$24,000) to ice cream counter at Rite
14 Aid).)

15 Plaintiff bears the burden of establishing any ADA violation on defendants' part, but,
16 even should she prevail on her asserted theory, this would only constitute a single predicate
17 (continuing) ADA violation, or offense, entitling her to a single assessment of the statutory
18 damages specified under Section 52(a). Accordingly, as a matter of law, she should be barred
19 from any additional statutory recovery under the UCRA.

20 **B. Defendants' Construction-Related Access Liability Must Be Limited to Actual**
21 **Damages and a Single Statutory Assessment**

22 Plaintiff's Complaint may also be read to assert a claim based on violation of
23 construction-related accessibility standards. Regardless, plaintiff should be limited to the
24 recovery of her actual damages (if any), and a single statutory assessment. This is because
25 California law does not allow for the windfall theory espoused by plaintiff, viz., that each time
26 she pushed open the front lobby door during her Housing Complex residency she should be
27 entitled to recover an additional statutory assessment.

28 Under California Civil Code section 55.56(a), the availability of statutory damages under

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Civil Code sections 52 and 54.3 is explicitly limited, and permitted “only if an accessibility violation actually denied the plaintiff full and equal access, that is, only if ‘the plaintiff personally encountered the violation on a particular occasion, or the plaintiff was deterred from accessing a place of public accommodation on a particular occasion.’” (*Munson v. Del Taco, Inc.*, 46 Cal.4th 661, 677-678 (Cal. 2009) (quoting Cal. Civ. Code § 55.56(b).) “It also limits statutory damages to one assessment per occasion of access denial, rather than being based on the number of accessibility standards violated.” (*Id.*, Cal. Civ. Code § 55.56(e).) That is, “to maintain an action for damages pursuant to section 54 et seq. an individual must take the additional step of establishing that he or she was denied equal access on a particular occasion.” (*Donald v. Cafe Royale, Inc.*, 218 Cal.App.3d 168, 183 (Cal.App. 1990).)

Civil Code “[s]ection 55.56 is part of a comprehensive statutory scheme that was enacted in 2008 with the intent of increasing voluntary compliance with equal access standards ‘while protecting businesses from abusive access litigation.’” (*Mundy v. Pro-Thro Enterprises*, 192 Cal.App.4th Supp. 1, 5 (App. Div. Cal. Super. Ct. 2011) (quoting *Munson v. Del Taco, Inc.*, 46 Cal.4th at 677 (emphasis supplied).) Indeed, the deliberative history behind the enactment references that the Legislation was “intended to reiterate these existing private enforcement rights, while at the same time creating incentives for compliance that reduce the need for private litigation, and providing measures that are intended to discourage frivolous lawsuits and threats of litigation and encourage early resolution efforts when disputes arise.” (*See* 8/28/08 Judicial Committee Analysis at p. 4.⁶) Thus, for example, the Legislature recognized that “a person staying at a hotel room with a defective bathroom in each of its 400 hotel rooms is denied full and equal access to the guestroom’s bathroom he or she intends to access, but is not entitled to 400 statutory damages awards.” (*See* 8/12/08 Senate Rules Committee Bill Analysis at pp. 8-9.⁷)

Instructive here is the decision in *Arnold v. Radisson Hotel Et Al.*, 2011 U.S. Dist. LEXIS 742 (C.D. Cal. 2011). There, plaintiff had stayed at the defendant’s hotel property and alleged that she had encountered numerous constructed-related access barriers over the course of her 3-

⁶ See accompanying Request for Judicial Notice at Ex. A.

⁷ See accompanying Request for Judicial Notice at Ex. B.

1 day stay, “including a heavy guestroom door.” (*Id.*, * 5.) Her primary damage was upset, and
 2 she was not able to point to any actual damages. (*Id.*, * 15.) In awarding damages under
 3 analogous provisions of the California Disabled Persons Act (“CDPA”), Cal. Civ. Code §§ 54
 4 and 54.1, the District Court found that “the statutory minimum of \$1,000 per violation is
 5 appropriate here.” Thus, the Court determined that \$1,000 for each violation would be awarded
 6 for the following:

7 The Court finds that Plaintiff encountered or was deterred by the following
 8 violations at the Hotel. (1) In the parking lot, the designated accessible parking
 9 space had a built-up ramp and no accessible path of travel to the nearest entrance
 10 due to barriers that blocked the path. (2) In the lobby, the registration counter did
 11 not have a lowered portion, and there was no accessible table close by for use by
 12 disabled persons. (3) *The guestroom door exceeded the maximum five pounds of*
 13 *opening pressure.* (4) Inside the guestroom, furniture obstructed the floor space
 14 between the bed and closet. (5) The guestroom desk had insufficient knee
 15 clearance. (6) The guestroom toilet was configured in a way that interfered with
 16 the ability to transfer to and from the toilet. (7) The guestroom shower/tub was
 17 incorrectly configured, with knobs that required pinching and twisting, grab bars
 18 mounted at the wrong height, and no fixed transfer or shower seat. (8) The pool
 19 area was inaccessible because each entrance had a change of elevation, the gates
 20 did not have a 10-inch kickplate, and there was no pool lift. (9) In the bar and
 21 restaurant, the bar did not have a lowered section, the bar tables were all elevated,
 22 and the restaurant did not have wheelchair-accessible tables. (10) In the various
 23 paths of travel around the Hotel, obstructions existed such as benches, trash
 24 receptacles, drop-offs that could cause an individual in a wheelchair to fall, ramps
 25 with slippery surfaces or excessive slopes, and noncompliant grab bars. (*Id.*, *
 26 15-16 (emphasis supplied).)

27 Notably, the \$1,000 per violation amount was not subject to multiplication by the Court
 28 for, e.g., each use of the non-compliant door or bath tub by the plaintiff. The statute was
 interpreted to allow the statutory recovery for each violation plaintiff encountered during her stay
 – *not* for each time she encountered the violation.

Also instructive is the decision in *Doran v. Embassy Suites Hotel*, 2002 U.S. Dist. LEXIS
 16116 (N.D.Cal. 2002) (“*Doran*”). In *Doran*, the District Court struck a plea for “daily
 damages” as not statutorily authorized, noting that California courts have “looked with disfavor
 on ever-mounting penalties and have narrowly construed the statutes which either require or
 permit them.” (*Id.*, *16.) *Doran* cited, in this regard, to *Hale v. Morgan*, 22 Cal.3d 388 (Cal.
 1978), holding that the mandatory award of daily damages as provided under Civil Code section
 789.3, which is potentially limitless and imposes a penalty more severe than that imposed for

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1 other more serious civil violations, may, under certain circumstances, produce constitutionally
2 excessive penalties. Thus, the court held that while *Hale* and other authorities “do not involve
3 the Civil Code sections at issue in the instant case [*i.e.*, the UCRA the CDPA], those cases
4 indicate that the phrase, ‘for each offense,’ like the phrase, ‘for each violation,’ provides for
5 statutory damages based on each specific instance of non-compliance, *rather than on the mere*
6 *passage of time.*” (*Id.*, * 15-16 (emphasis supplied).) Additionally, *Doran* noted that penalties
7 for many other forms of civil misconduct under state law are generally “limited either to a fixed
8 multiple of actual damages, to a specified total amount per ‘violation’ or to a fixed duration.”
9 (*Id.*, * 14-15.)

10 The California Legislature has expressly spoken to its intent to curtail abusive and
11 frivolous litigation in the equal access arena. Defendants concede there is no case interpretation
12 directly on point with our facts. As another District Court judge wrote, however, in declining
13 supplemental jurisdiction to sort out the language as to what, *e.g.*, “each offense” means under
14 the CDPA versus “each and every offense” under the UCRA:

15 The predominant reason that new law is not created in this arena is because
16 plaintiffs, like plaintiffs here, use the ADA, and its California counterparts, as
17 tools of extortion. Rarely, if ever, do ADA cases filed in federal court proceed
18 past the discovery stage because experienced ADA plaintiffs have honed their
19 litigation strategies so that it is usually cheaper and more efficient for defendants
20 to settle than fight these, often meritless, cases. (*Org. for the Advancement of*
Minorities v. Brick Oven Rest., 406 F.Supp.2d 1120, 1130 n. 8 (S.D.Cal. 2005).)

21 Here, plaintiff seeks essentially super-daily damages, *i.e.*, for each time she entered the
22 Housing Complex. Thus, under plaintiff’s theory of the case, she could simply have stood at the
23 front door of her building, pushing it open repeatedly, and ringing up \$4,000 for each effort.
24 Indeed, endorsement by this Court of such a cynical legal theory would effectively license every
25 equal access plaintiff’s attorney in the State to recommend to their clients, *e.g.*, hourly trips to
26 taco stands and ice cream shops with non-compliant counters, daily recording of visits to non-
27 compliant pizza parlor toilet facilities, and unlimited trying on of clothing in deficient retail
28 changing room facilities, with the aim at maximizing settlement leverage, recovery and legal
fees. Certainly, no lawmaker had this in mind.

What is more, if plaintiff’s position became the rule, it would result in a legally

Ultimately, the UCRA should be interpreted against its legislative backdrop and evolution. On this basis, as a matter of law, “each and every offense” under California Civil Code section 52(a) should, here, be limited to whatever legal violation plaintiff may establish for defendants’ unitary course of conduct in addressing the Housing Complex issue raised and resolved in the first seven weeks of plaintiff’s residency.

Opportunistically, plaintiff seeks to take advantage of a perceived statutory ambiguity to extort a prodigious windfall recovery in this action through the judicial process. The damage claim she espouses is not available, however, under our facts and governing law. Accordingly, defendants' Motion should in all respects be granted.

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DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (Case No. 10-02347 JCS)